

PETER V. SMILDE

IBLA 97-6

Decided April 30, 1998

Appeal from a decision of the Butte District Manager, Bureau of Land Management, Montana, dismissing a protest of a denial by the Garnet Resource Area Manager of permission to use a Bureau of Land Management road. MT 5000 (070).

Affirmed.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Applications--Rights-of-Way: Federal Land Policy and Management Act of 1976

A showing that the existence of reasonable alternative access was inconvenient or problematic is not sufficient for overturning a BLM decision to reject an application for use of a BLM road which was constructed for access to a timber sale and for forest management purposes and was not designed as an all-weather road for year-round use, suitable for access to private lands.

APPEARANCES: Peter V. Smilde, pro se; John C. Chaffin, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Billings, Montana, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Peter V. Smilde has appealed from an August 29, 1996, Decision by the Butte District Manager, Bureau of Land Management (BLM), Montana, denying his protest of a denial by the Acting Area Manager, Garnet Resource Area, of permission to use BLM's Skimmerhorn Road.

This controversy involves two distinct and separate road segments--the "BLM Skimmerhorn Road," and the "Old Skimmerhorn Road."

On August 19, 1996, Smilde filed with BLM an "appeal from an informal, oral decision by [the] Assistant Area Manager * * * refusing a temporary permission to use a key for the BLM padlocks at the upper and lower gates to the service road between Yreka and the Skimmerhorn Road in Range 14 West, MPM."

Smilde's appeal explained that on July 16, 1996, he met with the Assistant Area Manager and explained to him that the lower end of the

"[Old] Skimmerhorn Road" was washed out in two places and that he (Smilde) was therefore unable to traverse it with his vehicle.

Smilde alleged that neither the State nor BLM had ever improved or maintained the "[Old] Skimmerhorn Road," but that he (Smilde) and his brother graded it and constructed culverts for it. Smilde stated that this was a public road, that he had no funds for further road improvement, and that road maintenance was not his responsibility.

Smilde further stated that he and his brother had operated, for 30 years, a tree farm on their 80-acre property. Smilde questioned why, since logging trucks used and damaged the "BLM Skimmerhorn Road," he should not be allowed "temporary use of the road." (Aug. 13, 1996, Appeal at 2.)

Smilde further asserted that he lacked "reasonable access" to his house and farm property and that, under the circumstances, it would be "no more than fair" to allow him "to use the BLM road until such time as another road is available."

In the Decision before us on appeal, the Butte District Manager stated:

BLM's position concerning the "old Skimmerhorn Public Road" which provides access to the private lands in the area, is that it is probably a public road through prescriptive use. The private landowners have used, and we assume maintained, the road for over 30 years, according to your letter. The BLM does not use the road, and we do not have any responsibility or authority for maintenance or improvement of a public road.

The BLM constructed the BLM Skimmerhorn Road, which you requested to use, to access the Skimmerhorn Timber Sale. The road was constructed for log hauling and forest management purposes, and was not designed as an all-weather road suitable to access the private lands.

The District Manager also referred to the Skimmerhorn Creek Timber Sale Environmental Analysis and decisionmaking which occurred in 1984 and 1985. He stated that, according to that decisionmaking process, the BLM Skimmerhorn Road (spur A) would be closed to public use on a year-round basis in order to reduce erosion and maintenance costs and to protect big game habitat. This policy, the District Manager stated, was still in effect.

Accordingly, the District Manager found that Smilde's request for use of the road was "not compatible with current management direction." The District Manager further noted that Smilde had not shown that alternate access to his private lands was not available, or that he was restricted in making physical improvements to the Old Skimmerhorn Road.

Finally, the District Manager suggested that the access needs of all the private land owners in the area should be discussed in a community

meeting and should be initiated by private landowners. The District Manager stated that BLM would be a willing participant in such a discussion.

On appeal to this Board, Smilde repeats the arguments made in his August 13, 1996, letter. He asserts also that the Decision to deny him "temporary use" of BLM's Skimmerhorn Road is arbitrary and capricious. Smilde asserts that BLM is not giving proper consideration to his concerns.

The BLM responds that Smilde's appeal "is the result of an initial and continued oral request" and that Smilde never filed a written request outlining his needs and expectations. The BLM points out that though Smilde wants access to his private lands, he asks for "temporary" use but does not explain what "temporary" means.

The BLM asserts that Smilde has made no showing that he is "legally prohibited from using the Old Skimmerhorn Road." The BLM contends that Smilde's informal application was properly denied in view of policy directives under which BLM's Skimmerhorn Road is subject to specified limited use only.

The Decision Record for the Skimmerhorn Creek Timber Sale has been included in the case file. According to that record, part of "Spur A" was a 2.3 mile new road construction in connection with the sale. Smilde filed contemporaneous comments indicating the hope that a "proposed roadway" for the sale might "be maintained upon the completion of the logging project for the essential purpose of fire control." Smilde went on to note that "the existing Skimmerhorn Road has become virtually impassible." 1/

Responding to Smilde's comments, the Area Manager explained that road maintenance on BLM controlled roads was performed by timber sale contractors. The Area Manager further explained that BLM had no jurisdiction to require such maintenance on the "existing Skimmerhorn Creek Road." 2/

In this case, Smilde filed no formal right-of-way application with BLM as he might have pursuant to the regulations at 43 C.F.R. § 2802. Those regulations provide detailed instructions for anyone "interested in obtaining a right-of-way grant or temporary use permit involving use of public lands." 43 C.F.R. § 2802.1. 3/ Nevertheless, the Butte District Manager essentially adjudicated the matter in conformance with principles applicable to applications for rights-of-way. We conclude that the District Manager correctly rejected Smilde's request for use of BLM's Skimmerhorn Road.

[1] The BLM's authority to grant rights-of-way arises from section 501(a)(6) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(a)(6) (1994), which grants the Secretary of the Interior

1/ Letter of Sept. 15, 1984, from Smilde to Garnet Resource Area Manager.

2/ Letter of Oct. 17, 1984, from Area Manager to Smilde.

3/ The Department has traditionally regarded issuance of special use permits as appropriate only if the proposed use could not be authorized under other law. See 43 C.F.R. § 2920.1-1; R.L. Hoss, 137 IBLA 193, 199 (1996).

the discretionary authority to issue rights-of-way over, upon, under, or through public lands for roads, trails, or other means of transportation. See also 43 U.S.C. § 1761(a)(7) (1994). Approval of a right-of-way application is, therefore, a matter of discretion. Ben J. Trexel, 113 IBLA 250, 253 (1990), and cases there cited. Departmental regulations provide that an application may be denied if the authorized officer determines that the proposed right-of-way would not be in the public interest. 43 C.F.R. § 2802.4(a)(2). When unusual circumstances dictating another result are not shown, this Board will affirm a BLM decision rejecting a right-of-way application if the record demonstrates that the rejection decision is based on a reasoned analysis of the facts and was made with due regard for the public interest. See, e.g., Glenwood Mobile Radio Co., 106 IBLA 39, 41-42 (1988).

This Board has upheld BLM's rejection of right-of-way applications when feasible alternatives are present. See, e.g., Dwane Thompson, 88 IBLA 31 (1985); High Summit Oil & Gas, Inc., 84 IBLA 359, 92 I.D. 58 (1985), and cases cited therein; Lower Valley Power & Light, Inc., 82 IBLA 216 (1984).

Moreover, where the proposed access would conflict with other land management objectives, a showing that alternative access may be more difficult or expensive provides sufficient reason for overturning a BLM decision to reject a road right-of-way application. Intermac, Inc., 141 IBLA 61, 63 (1997); Albert Eugene Rumfelt, 134 IBLA 19, 22 (1995). The burden is on Smilde, as the party challenging BLM's decision, to support his allegations with evidence showing error. Smilde's conclusory allegations that BLM's determination was arbitrary and capricious do not meet this burden.

The record in this case demonstrates that BLM based its determination not to grant Smilde use of the BLM Skimmerhorn Road on a number of reasoned factors, including the public interest. Smilde has not cited any authority under which BLM would have been obligated to grant him use of the BLM Skimmerhorn Road. Moreover, as BLM points out in its answer, Smilde has not elaborated on the type of use he seeks. Thus, such factors as frequency, exclusivity, among others, remain uncertain. As indicated above, Smilde's inconvenience, which may include problematic access via the Old Skimmerhorn Road, is an insufficient basis for disturbing BLM's determination.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

James P. Terry
Administrative Judge

I concur:

James L. Burski
Administrative Judge